In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 911

JOHN SALANITRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Jury trial having been waived, petitioner was convicted by the court in the United States District Court for the District of Colorado on a one count indictment charging that he perjured himself in testimony before a grand jury, in violation of 18 U.S.C. 1621. He was sentenced to imprisonment for a year and a day and the court of appeals affirmed *per curiam* (Pet. App. A).

The grand jury was investigating possible violations of 18 U.S.C. 1952 and 1953—specifically the

transportation between Nebraska and Colorado of wagering paraphernalia and information in aid of racketeering, as to which it had received evidence before petitioner's appearance (R. 7-9). The indictment alleged that petitioner gave the following false testimony on April 4, 1969.

Q. Did you have a meeting in April of 1967 with —make that September of 1966, did you travel to Denver, Colorado, and meet one of the Smaldones and one Paul Villano at Stapleton Airport?
A. What year was that you say?
Q. '66.
A. No.
Q. You did not.
A. No.
Q. Have you ever come to Denver, Colorado, and met any of the Smaldones at Stapleton Airport?
A. No.
Q. Do you know Paul Villano?
A. No.

* * * *

Q. Have you ever met Clyde Smaldone?
A. Not to my knowledge, no.
Q. He has a nickname, that is Flip-Flop.
A. Definitely not.[1]

A detective of the Denver Police Department testified that on September 4, 1966, he observed petitioner

[1] Petitioner had appeared before the grand jury the day before and had been questioned about his relationship with the Smaldones. He either claimed his privilege or answered the questions negatively. He was then excused to consult with his counsel and requested to return on April 4.

talking with Clyde Smaldone and Paul Villano for a period of five to ten minutes, after which petitioner and his wife boarded a flight to Las Vegas (R. 28-29). An FBI agent testified that on January 5, 1967, petitioner told him that he had recently taken a vacation with his wife in Las Vegas and that on the way he met one of the Smaldones in Denver. The agent further testified that petitioner told him that he had done quite a bit of gambling with the Smaldones five years previously (R. 34-38). In finding petitioner guilty, the trial court determined (R. 93):

> [t]hat the defendant had met Clyde Smaldone in Denver at Stapleton Airport on or about the 4th of September, 1966; that the defendant talked with Clyde Smaldone at that time and place; and that one Paul Villano was with Clyde Smaldone at that time and place.

1. Petitioner contends that he was confused by the questioning (Pet. 9-15) and accordingly that the evidence failed to show an intent by him to impede the investigation of the grand jury. This contention does not withstand scrutiny.

The questions upon which the perjury prosecution was based were preceded by a particularized inquiry into petitioner's dealings and meetings with various members of the Smaldone family to which petitioner either answered negatively or asserted his privilege against self-incrimination (see, *e.g.*, R. 109-113). The background was thus entirely different from the situation in *Van Liew* v. *United States*, 321 F. 2d 674 (C.A. 5) upon which petitioner so heavily relies (Pet. 9-11), which dealt with matters of expertise

where no account was taken of other questioning which could have led the witness to misinterpret the questions to which he allegedly made perjurious responses.[3] Here, the United States Attorney corrected his inquiry as to the date of the meeting in question; indeed, at petitioner's request this date was repeated, following which petitioner twice denied the meeting (see *supra*, p. 2). Petitioner's strained effort to establish that confusion resulted because he did not understand the term "meeting" to encompass the airport encounter or because the United States Attorney may have mispronounced Villano's first name were matters as to which petitioner did not seek clarification at the time; in any event, they hardly support the claim of confusion when viewed in the total context. See *Vitello* v. *United States*, 425 F. 2d 416, 424 (C.A. 9), certiorari denied, October 12, 1970 (No. 230, this Term); *United States* v. *Stone*, 429 F. 2d 138, 140 (C.A. 2).

Petitioner's claim of lack of sufficient criminal intent is similarly without merit. The only intent necessary for conviction under 18 U.S.C. 1621 is an intent to give false testimony under oath, with the further requisite that the testimony relate in fact to a material matter. *United States* v. *Stone*, *supra*. The test of materiality—which was fully satisfied here—is whether the testimony had the tendency to impede or frustrate the grand jury's investigation. See

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[3] *United States* v. *Wall*, 371 F. 2d 398 (C.A. 6) is likewise inapposite; that case involved vague questioning which could well have been misunderstood by the witness.

United States v. *Stone*, *supra*, 429 F.2d at 140, and cases there collected.

2. Petitioner also urges that the evidence did not satisfy the "two witness" rule applicable to perjury prosecutions. The testimony of petitioner was that he did not meet Clyde Smaldone at the Stapleton Airport in Denver in September 1966, which he amplified by answering that, to his knowledge, he had never met Clyde Smaldone (*supra*, p. 2). This was directly contradicted by the testimony of the Denver detective who saw the meeting; his testimony was corroborated by the testimony of the FBI agent that petitioner himself told him that he had recently taken a vacation in Las Vegas with his wife and had met one of the Smaldones at the airport in Denver. As the court below held (Pet. 2a-3a), this latter testimony was sufficient to meet the requirement of the rule that direct evidence of the falsity of defendant's testimony be corroborated. *Weiler* v. *United States*, 323 U.S. 606, 608-611; *United States v. Hagarty*, 388 F. 2d 713, 716 (C.A. 7); *Vuckson* v. *United States*, 354 F. 2d 918, 920 (C.A. 9), certiorari denied, 384 U.S. 991.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1970.

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